IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 232 of 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UTTARSANDA SEVA SAHAKARI MANDLI LTD. - Appellant(s)
Versus
USMANGANI & SULEMAN & 2 - Defendant(s)

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Appearance :
MR NS DESAI for Appellant(s) : 1,
MR HM PARIKH for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 28/02/2007

ORAL JUDGMENT

1. Mr.N.S. Desai, learned counsel for the appellant and Mr.H.M. Parikh, learned counsel for the respondent No.1

2. It is submitted by the parties that the respondent No.2 and 3, partners of respondent No.1 firm, have expired.

3. In the opinion of this Court, the appeal would not abate in view of Rule IV of order 30 of the Code of Civil Procedure, because in a case where, a partner dies, legal representatives are not required to be brought on record and if legal representatives of deceased partner propose to come on the record, then, they have to make such an application.

4. Short facts necessary for disposal of the present case are that the plaintiff filed the suit against the respondent firm and its partners for recovery of Rs.5996.26 ps., containing 5034.00 towards principal amount and Rs.962.26 on account of interest. The submission was that the defendants had purchased certain millet bags at the rate of Rs.108 per quintal, but did not make the payment. The defendants appeared before the trial court and filed their written statement submitting inter-alia that they did purchase the said goods, but they had returned back 5 bags and for those 5 bags, the plaintiff was not be entitled to recover anything. For rest of the amount, it was submitted that the balance price was paid on 21/8/1978 and 2/9/1978 to Kiritbhai Gordhanbhai Patel, an employee of the plaintiff, who otherwise was also entitled to receive the money. During the course of

the trial, the defendant's partner appeared in the Witness Box and also examined one witness to prove the fact of the payment. The plaintiff, however, submitted that Kiritbhai Gordhanbhai Patel has left for United Kingdom, therefore, he could not be examined. The trial court, after appreciating the evidence, held that the defendants were successful in proving their case, it accordingly, dismissed the suit and as the dismissal was maintained in appeal, the plaintiff is before this Court.

5. Mr.Desai, learned counsel for the plaintiff has raised only one submission, that is, in absence of examination of Kiritbhai Gordhanbhai Patel, the evidence led by the defendants, was incomplete and the courts below were unjustified in relying upon the said ipse dixit of the defendant's partner and the corroborative evidence of the interested witness.

6. Mr.Parikh, learned counsel for the respondents, on the other hand, submitted that the question falls within the domain of appreciation of evidence and if the two courts have relied upon the evidence and there is some evidence to support the finding and the finding cannot be said to be perverse, there is no scope for interference in this appeal

7. Mr.Desai, learned counsel for the plaintiff has raised only one submission, that is, in absence of examination of Kiritbhai Gordhanbhai Patel, the evidence led by the defendants, was incomplete and the courts below were unjustified in relying upon the said ipse dixit of the defendant's partners and the corroborative evidence of the interested witness.

8. In the opinion of this Court, it cannot be argued that present is a case of no evidence from the side of the defendants. It also cannot be argued that the defendants could not discharge the burden cast upon them. In fact, after the parties led evidence, the question of burden of proof lost its importance and the court was required to appreciate the evidence which was available on the record. If the judicial conscious of the two courts was satisfied by the defence evidence that money has already been paid and nothing was due, then, simply on the ground that another view is possible, it would not be proper for this Court to interfere in the matter. If the two courts have found that the defendant's partner and his witness have proved the fact of repayment, then such finding would be a finding of fact. I find no reason to interfere in the appeal.

9. The appeal deserves to and is accordingly dismissed. No costs. Let a decree be framed accordingly.

(R.S. GARG, J.)

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